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No. 10-881

Supreme Court, U.S.
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In The

Supreme Court of the United States

HENRY RAAB and CLARA MONTAGNA,

Petitioners,

v.

THE BOROUGH OF AVALON, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Superior Court Of New Jersey

RESPONDENT BOROUGH OF AVALON'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioners are jurisdictionally barred under United States Supreme Court Rule 13.

2. Whether Petitioners fail to present an issue worthy of consideration by this Court.

3. Whether Petitioners bring before the Court issues not adjudicated below and/or issues related to nonparties.

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STATEMENT OF THE CASE

Petitioners recite in their "STATEMENT OF THE CASE: FACTS" various arguments and misstatements that do not appear of record anywhere below. To dissect allegation-by-allegation this portion of the Petition would fly in the face of judicial economy and the requirement of brevity of submissions to the Court. Respondent, Borough of Avalon (hereinafter "Avalon"), respectfully submits that the facts of this matter are as detailed in the decision of the Appellate Division of the New Jersey Superior Court in *Raab v. Borough of Avalon*, 392 N.J. Super. 499 (App. Div. 2007), certif. denied, 192 N.J. 475 (2007). In this published opinion, the Court clearly stated the facts of the case as well as the procedural history to that point in time. Avalon hereby incorporates the factual findings of the Appellate Division of the New Jersey Superior Court in *Raab v. Borough of Avalon*, 392 N.J. Super. 499 (App. Div. 2007), certif. denied, 192 N.J. 475 (2007) herein by reference. These facts are included at pages A-33 to A-42 of the Petition.

Since the decision in *Raab v. Borough of Avalon*, 392 N.J. Super. 499 (App. Div. 2007), certif. denied, 192 N.J. 475 (2007), Petitioners have attempted to get several more bites at the apple despite being initially denied Certification by the New Jersey Supreme Court on September 7, 2007. First, they created an application with the Trial Court in an attempt to revisit issues long adjudicated. That application was denied on April 25, 2008. There, the Trial Judge stated, "This motion now almost one year later seeks

to open the final judgment to clarify and for other relief. Consistent with Plaintiffs' conduct throughout this litigation the delay of one year to seek relief is extraordinary especially when these same issues have been presented in the briefing in the Appellate Court." (A-22 to A-23 of the Petition).

It was this decision, where the Trial Court found all of Petitioners' arguments to be rehashings of prior arguments that had been finally disposed of for at least a year prior to April 25, 2008, which Petitioners took back to the Appellate Division in an attempt at yet another bite of the apple. The Appellate Division, on July 28, 2009, in an unpublished opinion reproduced at pages A-3 to A-17, characterized that appeal as "nothing more than an effort to re-litigate issues already adjudicated." (A-16 of the Petition). The Appellate Division went on to state, "[W]e will not address here the claims based upon payment of taxes over the years, failure of the Borough to have followed the statutory procedures for an eminent domain proceeding, failure of the Borough to have identified specific lots, as opposed to more generally defining the area taken as the beachfront strip between 13th Street and 80th Street, and the like. We have already rejected these issues in the prior appeal."

Thus, as of July 28, 2009, both the Trial Court and the Appellate Division of the New Jersey Superior Court had clearly opined, in effect, that Petitioners' litigation tactic had become to simply attempt to re-litigate issues adjudicated and settled in 2007. The New Jersey Supreme Court once again denied

certification on June 30, 2010 (A-1 of the Petition). Then, in response to Petitioners' motion to the New Jersey Supreme Court for reconsideration of the Court's second denial of certification, the Court issued a denial of same on October 7, 2010.

It is important to note that what the New Jersey Supreme Court had disposed of in April and October of 2010, through its second denial of certification and its denial of Petitioners' motion for reconsideration of that second denial of certification, was the Trial and Appellate Courts' refusal in 2009 to reopen a case that was judicially done and over with in 2007.

REASONS FOR DENYING WRIT

I. PETITIONERS HAVE FILED A PETITION OVER WHICH THE COURT LACKS JURISDICTION UNDER RULE 13, INASMUCH AS THE FILING WAS OUT OF TIME.

Rule 13 of the Rules of the United States Supreme Court states in relevant part,

> **1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment.** * * *

> **2. The Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time. See, *e.g.*, 28 U.S.C. §2101(c).**
>
> **3. The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, * * * the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing * * * .**

Here, assuming that a motion for reconsideration of denial of certification presented to the New Jersey Supreme Court in the context of this case qualifies as a "motion for rehearing" under Rule 13, which Avalon does not concede, Petitioners were required to file their Petition on or before January 4, 2011. Tuesday, January 4, 2011, is the 90th day after October 7, 2010, the date on which the New Jersey Supreme Court denied Petitioners' motion for reconsideration of its second denial of certification (A-62 of the Petition). Thus, the Petition, having been filed on January 5, 2011, was filed out of time and should not be granted as the Court is without jurisdiction.

If the Court were to conclude, Avalon believes properly, that Petitioners' motion for reconsideration

below does not equate to a "motion for rehearing" under Rule 13, then the Petition would need to have been filed on or before September 27, 2010. The New Jersey Supreme Court has stated that a denial of certification can never be considered a disposition on the merits. *Maxfield v. Board of Education of Ridgewood Township*, 217 N.J. Super. 267, 273, 525 A.2d 727, 730 (App. Div. 1986). Accordingly, Petitioners' motion for reconsideration of the New Jersey Supreme Court's denial of certification was truly not a "motion for rehearing" as contemplated by Rule 13 of the United States Supreme Court Rules.

Under either approach, the Petition was not timely filed and, respectfully, must be denied as the Court lacks jurisdiction.

II. THE ISSUES PRESENTED BY PETITIONERS WERE DETERMINED IN 2009 BY THE TRIAL COURT AND APPELLATE DIVISION OF THE NEW JERSEY SUPERIOR COURT TO CONSTITUTE AN EFFORT TO RE-LITIGATE ISSUES ALREADY ADJUDICATED IN BOTH THE APPELLATE DIVISION AND THE NEW JERSEY SUPREME COURT IN 2007 AND PETITIONERS SHOULD NOT BE ALLOWED TO BOOTSTRAP THESE ISSUES UP INTO THE UNITED STATES SUPREME COURT THROUGH PROCEDURAL SLEIGHT OF HAND.

As detailed herein above, the Trial Court and the Appellate Division in New Jersey characterized

Petitioners' litigation strategy after 2007 as a transparent attempt to re-litigate settled issues. The Trial Court stated, "Consistent with Plaintiffs' conduct throughout this litigation the delay of one year to seek relief is extraordinary especially when these same issues have been presented in the briefing in the Appellate Court." (A-22 to A-23 of the Petition). The Appellate Division of the New Jersey Superior Court stated that Petitioners' continuing courtroom machinations were "nothing more than an effort to re-litigate issues already adjudicated." (A-16 of the Petition). The Appellate Division, after listing the same litany of allegations which have been included in the Petition, stated, "We have already rejected these issues in the prior appeal." *Id.*

Thus, were Certiorari to be granted in the instant case, this Court would be allowing appeal of matters long ago adjudicated, the re-litigation of which was soundly rejected by the State Courts in New Jersey. Certainly, the jurisdiction of the United States Supreme Court should not be invoked on such a record. Petitioners should not be permitted to attach bootstraps to issues adjudicated in 2007 and attempt to pull them up into the United States Supreme Court through a late filed Petition for Writ of Certiorari in 2011.

III. PETITIONERS' ATTEMPT TO BRING BEFORE THIS COURT ISSUES NEVER RAISED BELOW AND MAKE ALLEGATIONS OF DUE PROCESS VIOLATIONS AGAINST THE NEW JERSEY SUPREME COURT WHERE THAT COURT IS NOT A PARTY.

As detailed above, the issues in this matter were conclusively decided in 2007. Petitions now seek to have the United States Supreme Court apply a completely inapplicable holding, which was decided in 2008, to the case at bar. This case dealt with local redevelopment and housing issues and is completely distinguishable factually and legally from the instant case. *See*, *Harrison Redevelopment Agency v. DeRose*, 398 N.J. Super. 361, 942 A.2d 59 (App. Div. 2008). This approach is, to say the least, somewhat bizarre. There is no authority for the proposition that the United States Supreme Court may be used as a mechanism to force a retrial of settled issues based on the argument that some new State case has been decided which may have persuaded the State Courts if it had existed at the time of decision. Yet, this is precisely what Petitioners attempt. Respectfully, the Court should give no credence to these arguments.

Additionally, Petitioners submit as a "Question Presented," the following:

> **Whether the New Jersey Supreme Court denied Petitioners' right to equal protection guaranteed by the Fourteenth Amendment by failing to grant equity to**

Petitioners based on *Klumpp v. Avalon* decided June 22, 2010, before denying Petitioners' appeal on June 30, 2010 and motion for reconsideration on October 7, 2010?

Here, Petitioners shift their claims from Respondents to the New Jersey Supreme Court itself. Avalon respectfully points out that the New Jersey Supreme Court is not a party to this matter and it does not appear that any claim has been filed by Petitioners against the New Jersey Supreme Court for any alleged violation of Petitioners' equal protection rights. Certainly, neither Respondent in this matter could be held responsible for the actions of the New Jersey Supreme Court in deciding one matter differently from another. That conduct would be the Court's alone. Accordingly, it is wholly improper for Petitioners to attempt to raise such claims for the first time through the use of the Certiorari procedure in the United States Supreme Court.

IV. PETITIONERS' LEGAL ARGUMENTS ARE COMPLETELY WITHOUT MERIT AND PRESENT NO QUESTION WHICH WOULD BE APPROPRIATE FOR DISPOSITION BY THE UNITED STATES SUPREME COURT.

Petitioners misstate the prior holding of this Court in *United States v. Clarke*, 445 U.S. 253, 257, 100 S. Ct. 1127 (1980). Petitioners represent that *Clarke* stands for the proposition that no governmental entity may ever effectuate a taking without

availing itself first of a statutory eminent domain process. (P16). This is not true. Chief Justice Rehnquist, writing for a 7-2 majority in the *Clarke* case expounded on the fact that there can be a claim for relief from a governmental taking of real property which occurs by other than an eminent domain proceeding, the claim being one for "inverse condemnation." *See id.* Chief Justice Rehnquist described and established a process for seeking just compensation on a claim of inverse condemnation which has been recognized in New Jersey. *See*, *287 Corporate Center Associates v. Township of Bridgewater*, 101 F.3d 320, 323 (3d Cir. 1996); *Russo Farms, Inc. v. Vineland Board of Education*, 144 N.J. 84 (1996). *See also*, *Morey v. Essex County*, 94 N.J.L. 427, 430 (E&A 1920); *Harisadan v. East Orange*, 187 N.J. Super. 65, 70 (App. Div. 1982); *Blazer Corporation v. N.J. Sports and Authority*, 195 N.J. Super. 542, 552-553 (Law Div. 1984), aff'd on other grounds, 199 N.J. Super. 107 (App. Div. 1985), certif. denied, 101 N.J. 261 (1985).

Chief Justice Rehnquist stated as follows:

> **To accomplish a taking by seizure, on the other hand, a condemning authority need only occupy the land in question. Such a taking thus shifts to the landowner the burden to discover the encroachment and to take affirmative action to recover just compensation.**

United States v. Clarke, 445 U.S. 253, 257, 100 S. Ct. 1127 (1980).

It is clear that Petitioners misstate the holding of *Clarke* and their arguments in this regard should be rejected as a basis for granting Certiorari.

Petitioners next divert into a fantastical "what if" and explore what some hypothetical attorney might have concluded sometime between 1962 and 1996 about the state of the law. (P17-18) These arguments are improper and completely without merit. A hypothetical about what a Court would have decided during this period of time might be more defensible and could only reasonably conclude that the body of jurisprudence that does exist on the topic is appropriate. It is worth noting that none of these arguments were ever presented to any Court below. Clearly, these hypothetical arguments cannot form the basis for a grant of Certiorari.

CONCLUSION

Petitioners have filed out of time in violation of Rule 13 of the Rules of the United States Supreme Court. Consequently, the Court is without jurisdiction and the Petition must be denied.

The New Jersey Courts that have dealt with this litigation substantively after 2007 have all concluded that Petitioners are simply using procedural bootstrapping in order to re-litigate this case. Respectfully, the United States Supreme Court should not be used in such a manner.

Petitioners have attempted to present entirely new issues and make allegations against the New Jersey Supreme Court in order to create some basis for Certiorari that does not exist.

Petitioners' legal arguments are erroneous or based on pure speculation.

For all of the above reasons, the Petition for Certiorari in this matter should be denied.

Respectfully submitted,

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